



[4910-06-P]

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Part 209

[Docket No. FRA-2004-17530; Notice No. 4]

RIN 2130-AC61

### **Inflation Adjustment of the Ordinary Maximum and Aggravated Maximum Civil Monetary Penalties for a Violation of the Hazardous Material Transportation Laws or Regulations, Orders, Special Permits, and Approvals Issued Under Those Laws**

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Interim final rule.

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**SUMMARY:** To comply with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, FRA is adjusting the minimum penalty, ordinary maximum penalty, and the aggravated maximum penalty that it will apply when assessing a civil monetary penalty for a knowing violation of the Federal hazardous material transportation laws or a regulation, special permit, order, or approval issued under those laws. The aggravated maximum penalty is available only for a violation that results in death, serious illness, or severe injury to any person or substantial destruction of property. In particular, FRA is increasing the minimum penalty for a training violation from \$450 to \$463; the ordinary maximum civil monetary penalty per violation from \$75,000 to \$77,114; and the aggravated maximum civil penalty from \$175,000 to \$179,933.

**DATES:** This interim final rule is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Roberta Stewart, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE, Mail Stop 10, Washington, DC 20590 (telephone 202-493-6027), [roberta.stewart@dot.gov](mailto:roberta.stewart@dot.gov).

**SUPPLEMENTARY INFORMATION:** On November 2, 2015, President Barack Obama signed the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Inflation Act). Public Law 114-74, Sec. 701. This amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Act) that required each agency to (1) adjust by regulation each maximum civil monetary penalty (CMP), or range of minimum and maximum CMPs, within that agency's jurisdiction by October 23, 1996, and (2) adjust those penalty amounts once every four years thereafter, to reflect inflation. See Public Law 101-410, 104 Stat. 890, 28 U.S.C. 2461, note, as amended by Section 31001(s)(1) of the Debt Collection Improvement Act of 1996, Public Law 104-134, 110 Stat. 1321-373, April 26, 1996. Under the 2015 Inflation Act, agencies must make a catch-up adjustment for CMPs with the new penalty levels published by July 1, 2016, to take effect no later than August 1, 2016. In addition, agencies must make annual inflation adjustments, starting January 15, 2017, based on Office of Management and Budget (OMB) guidance.

In the 2015 Inflation Act, Congress recognized the important role CMPs play in deterring violations of Federal laws, regulations, and orders and determined that inflation has diminished the impact of these penalties. In the Inflation Act, Congress countered the

effect that inflation has had on the CMPs by having the agencies charged with enforcement responsibility administratively adjust the CMPs.

This interim final rule is published under 49 U.S.C. 5123 and 5124, which provide civil and criminal penalties for violations of the Federal hazardous material transportation laws or a regulation, order, special permit, or approval issued under those laws. The Pipeline and Hazardous Materials Safety Administration (PHMSA) issues the hazardous material transportation regulations. 49 CFR 1.96(b)(1). However, FRA is authorized as the delegate of the Secretary of Transportation to enforce the hazardous material statutes, regulations and orders, including the civil penalty provisions codified primarily at 49 U.S.C. 5123. 49 CFR 1.89(j). In this interim final rule, FRA is amending all references to the minimum and maximum civil penalties in 49 CFR part 209, app. B, to raise the minimum CMP for training violations from \$450 to \$463; the ordinary maximum CMP per violation from \$75,000 to \$77,114; and the aggravated maximum CMP from \$175,000 to \$179,933.

### **Description of the Adjustment Calculation**

The 2015 Inflation Act requires FRA to calculate the inflation adjustment by increasing the maximum CMP, or the range of minimum and maximum CMPs, based on the Consumer Price Index for the month of October 2015, not seasonally adjusted. The calculation uses multipliers to adjust the maximum CMP, or the range of minimum and maximum CMPs, based on the year the penalty was established or last adjusted by statute or regulation other than under the Inflation Act. Congress passed the Moving Ahead for Progress in the 21<sup>st</sup> Century Act in 2012 (MAP-21), which amended the maximum penalty (ordinary maximum) for a knowing violation of a Federal hazardous material

safety law, regulation, order, special permit, or approval to \$75,000. Pub. L. 112-141 (July 6, 2012). MAP-21 also set at \$175,000 the maximum civil penalty for a person who knowingly violates the Federal hazardous material transportation laws or a regulation, order, special permit, or approval issued under those laws that results in death, serious illness, or severe injury to any person or substantial destruction of property (aggravated maximum), and also added a \$450 minimum for a training violation.

OMB guidance, M-16-06, “Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015,” dated Feb. 24, 2016, states that after applying the multiplier, FRA must round the penalty levels to the nearest dollar.<sup>1</sup> The 2015 Inflation Act also specifies that agencies shall not increase penalty levels by more than 150 percent of the corresponding levels in effect on November 2, 2015. If the new amount or range of the increase exceeds 150 percent above the last reported level(s), the new amount or range should be reduced to 150 percent over the last reported level(s). The resulting penalty level(s) in that case would be 250 percent of the last reported level(s).

Applying the inflation adjustment calculation, FRA determined the minimum CMP for training violations should be raised from \$450 to \$463; the ordinary maximum CMP should be raised from \$75,000 to \$77,114; and the aggravated maximum CMP should be raised from \$175,000 to \$179,933.

### **Calculations to Determine CMP Updates for 2016**

#### **1. Minimum CMP of \$450 for Training Violations Raised to \$463**

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<sup>1</sup> Available at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf>. See also Public Law 114-74, Sec. 701.

As the 2015 Inflation Act requires, FRA evaluated the minimum CMP of \$450 for training violations and concluded it should increase to \$463, as the next calculations show. The 2012 multiplier of 1.02819 (since the last update not for inflation was in 2012, by MAP-21) times \$450 equals \$462.68, or \$463 rounded to the nearest dollar. The statutory 150 percent ceiling would be \$450 (the penalty level in effect on November 2, 2015, including Inflation Act increases), times 2.5, or \$1,125. Because \$463 is less than the \$1,125 ceiling, the 150 percent limit does not apply. The inflation adjusted minimum penalty is \$463, and applies to all violations of the hazardous materials statutes, regulations, special permits, approvals, and orders related to training. This new FRA minimum penalty for training violations will apply to violations that occur on or after **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**2. Ordinary Maximum CMP of \$75,000 Raised to \$77,114**

As the 2015 Inflation Act requires, FRA evaluated the ordinary maximum CMP and determined it should increase to \$77,114, as the following calculations show. The 2012 multiplier of 1.02819 (since the last update not for inflation was in 2012, by MAP-21) times \$75,000 equals \$77,114.25, or \$77,114 rounded to the nearest dollar. The statutory 150 percent ceiling would be \$75,000 (the penalty level in effect on November 2, 2015, including Inflation Act increases), times 2.5, or \$187,500. Because \$77,114 is less than the \$ 187,500 ceiling, the 150 percent limit does not apply. The inflation adjusted ordinary maximum penalty is \$77,114, and applies to all violations of the hazardous materials transportation statutes, regulations, special permits, approvals, and orders. Therefore, the ordinary maximum CMP should increase from \$75,000 to

\$77,114. This new FRA ordinary maximum penalty will apply to violations that occur on or after **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

### **3. Aggravated Maximum CMP of \$175,000 Raised to \$179,933**

FRA also evaluated the maximum CMP for an aggravated violation and determined it should increase to \$179,933, as the following calculations show. The 2012 multiplier of 1.02819 (since the last update not for inflation was in 2012, by MAP-21) times \$175,000 equals \$179,933.25, or \$179,933, rounded to the nearest dollar. The statutory 150 percent ceiling would be \$175,000 (the penalty level in effect on November 2, 2015, including Inflation Act increases), times 2.5, or \$437,500. Because \$179,933 is less than the \$437,500 ceiling, the 150 percent limit does not apply. The inflation adjusted aggravated maximum penalty is \$179,933, and applies to all violations of the hazardous materials transportation statutes, regulations, special permits, approvals, and orders. Therefore, the aggravated maximum should increase from \$175,000 to \$179,933. This new FRA aggravated maximum penalty will apply to violations that occur on or after **[INSERT DATE 30 DAYTS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

### **Public Participation**

FRA is proceeding to an interim final rule without providing a notice of proposed rulemaking or an opportunity for public comment. The adjustments the 2015 Inflation Act requires are ministerial acts over which FRA has no discretion, making public comment unnecessary. As such, notice and comment procedures are “impracticable, unnecessary, or contrary to the public interest” within the meaning of the

Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3)(B). FRA is issuing these amendments as an interim final rule applicable to all future hazardous materials transportation civil penalty cases under its authority to cite for violations that occur on or after the effective date of this interim final rule.

### **Regulatory Impact**

A. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures

This interim final rule has been evaluated consistent with Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT policies and procedures. It is not considered a significant regulatory action under section 3(f) of Executive Order 12866. The rule is expected to have minimal economic impacts. Additionally, FRA has no discretion to change the amount by which the CMPs are updated due to the clear direction in the 2015 Inflation Act and OMB memorandum M-16-06. Further, this rule is not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; Feb. 26, 1979) because it is limited to ministerial acts on which the agency has no discretion, and the economic impact of the interim final rule is minimal to the extent that preparation of a regulatory evaluation is not warranted.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (RFA), Public Law 96-354, as amended, and codified as amended at 5 U.S.C. 601-612, and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking), require agency review of

proposed and final rules to assess their impact on “small entities” for purposes of the RFA. An agency must prepare a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant economic impact on a substantial number of small entities. FRA does not expect this interim final rule will have a significant economic impact on a substantial number of small entities. Although this interim final rule will apply to railroads, hazardous materials shippers, and others that are considered small entities, there is no economic impact on any person who complies with the Federal hazardous materials laws and the regulations, special permits, approvals, and orders issued under those laws.

In addition, FRA has determined the RFA does not apply to this rulemaking. The 2015 Inflation Act requires FRA to publish an interim final rule and does not require FRA to complete notice and comment procedures under the APA. The Small Business Administration’s A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act (2003), provides that:

If, under the APA or any rule of general applicability governing federal grants to state and local governments, the agency is required to publish a general notice of proposed rulemaking (NPRM), the RFA must be considered [citing 5 U.S.C. 604(a)]...If an NPRM is not required, the RFA does not apply.

Therefore, because the 2015 Inflation Act does not require an NPRM for this rulemaking, the RFA does not apply.

C. Federalism

This interim final rule will not have a substantial effect on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Thus, consistent with



Executive Order 13132 (Federalism), preparation of a Federalism assessment is not warranted.

D. Paperwork Reduction Act

There are no new information collection requirements in this interim final rule to submit for OMB review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

E. Unfunded Mandates Reform Act of 1995

This interim final rule will not result in the expenditure, in the aggregate, of \$156,000,000 or more in any one year by State, local, or Indian Tribal governments, or the private sector. Thus, consistent with Section 202 of the Unfunded Mandates Reform Act of 1995 (Public Law 104–4, 2 U.S.C. 1532), preparation of a written statement detailing the effect of such an expenditure is not warranted.

F. Environmental Impact

FRA has evaluated this interim final rule under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), other environmental statutes, related regulatory requirements, and its “Procedures for Considering Environmental Impacts” (FRA’s Procedures) (64 FR 28545; May 26, 1999). FRA has determined that this interim final rule is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA’s NEPA Procedures, “Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation.” See 64 FR 28547 (May 26, 1999). Categorical exclusions (CEs) are actions identified in an agency’s NEPA implementing procedures that do not normally have a significant impact

on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4.

In analyzing the applicability of a CE, the agency must also consider whether extraordinary circumstances are present that would warrant a more detailed environmental review through the preparation of an EA or EIS. Id. Under section 4(c) and (e) of FRA's Procedures, FRA has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. The purpose of this rulemaking is to comply with the Inflation Act, as amended by the 2015 Inflation Act. Specifically, FRA is adjusting the minimum, maximum, and aggravated maximum penalty that it will apply when assessing a civil penalty for a violation of a Federal hazardous materials law, regulation, special permit, approval, or order. FRA does not anticipate any environmental impacts from this requirement and finds there are no extraordinary circumstances present in connection with this interim final rule.

G. Executive Order 12898 (Environmental Justice)

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a) (91 FR 27534; May 10, 2012) require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking

activities, as appropriate. FRA has evaluated this interim final rule under Executive Order 12898 and the DOT Order and has determined that it would not cause disproportionately high and adverse human health and environmental effects on minority populations or low-income populations.

H. Executive Order 13175 (Tribal Consultation)

FRA has evaluated this interim final rule under the principles and criteria contained in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. The interim final rule would not have a substantial direct effect on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would not preempt tribal laws. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

**List of Subjects in 49 CFR Part 209**

Administrative practice and procedure, Hazardous materials transportation, Penalties, Railroad safety, Reporting and recordkeeping requirements.

**The Interim Final Rule**

In consideration of the foregoing, part 209 of subtitle B, chapter II of title 49 of the Code of Federal Regulations is amended as follows:

**PART 209—[AMENDED]**

1. The authority citation for part 209 continues to read as follows:

**Authority:** 49 U.S.C. 5123, 5124, 20103, 20107, 20111, 20112, 20114; 28 U.S.C. 2461, note; and 49 CFR 1.89.

2. Revise § 209.103(a) and (c) to read as follows:

**§ 209.103 Minimum and maximum penalties.**

(a) A person who knowingly violates a requirement of the Federal hazardous materials transportation laws, an order issued thereunder, subchapter A or C of chapter I, subtitle B, of this title, or a special permit or approval issued under subchapter A or C of chapter I, subtitle B, of this title is liable for a civil penalty of not more than \$77,114 for each violation, except that—

(1) The maximum civil penalty for a violation is \$179,933 if the violation results in death, serious illness, or severe injury to any person, or substantial destruction of property and

(2) A minimum \$463 civil penalty applies to a violation related to training.

\* \* \* \* \*

(c) The maximum and minimum civil penalties described in paragraph (a) above apply to violations occurring on or after **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

3. Revise the last sentence of § 209.105(c) to read as follows:

**§ 209.105 Notice of probable violation.**

(c) \* \* \* In an amended notice, FRA may change the civil penalty amount proposed to be assessed up to and including the maximum penalty amount of \$77,114 for each violation, except that if the violation results in death, serious illness or severe injury to any person, or substantial destruction of property, FRA may change the penalty amount proposed to be assessed up to and including the maximum penalty amount of \$179,933.

**Appendix B to Part 209—[Amended]**

4. Amend appendix B to part 209 as follows:

a. In the introductory text, revise the second sentence of the first paragraph, the last sentence of the second paragraph, and the next to last sentence of the third paragraph;

b. In the table “CIVIL PENALTY ASSESSMENT GUIDELINES,” below the heading “PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGES,” revise the entry for “§§ 173.24(b)(1) and 173.24(b)(2) and 173.24(f)(1) and 173.24(f)(1)(ii)”, and revise the entry for “§ 173.24(c)”;

c. Revise footnote 2.

The revisions read as follows:

**Appendix B to Part 209—Federal Railroad Administration Guidelines for Initial Hazardous Materials Assessments**

\* \* \* The guideline penalty amounts reflect the best judgment of the FRA Office of Railroad Safety (RRS) and of the Safety Law Division of the Office of Chief Counsel (RCC) on the relative severity of the various violations routinely encountered by FRA inspectors on a scale of amounts up to the maximum \$77,114 penalty, except the maximum civil penalty is \$179,933 if the violation results in death, serious illness or severe injury to any person, or substantial destruction of property, and a minimum \$463 penalty applies to a violation related to training. \* \* \*

\* \* \* When a violation of the Federal hazardous material transportation law, an order issued thereunder, the Hazardous Materials Regulations or a special permit, approval, or order issued under those regulations results in death, serious illness or severe injury to any person, or substantial destruction of property, a maximum penalty of at least \$77,114 and up to and including \$179,933 shall always be assessed initially.

\* \* \* In fact, FRA reserves the express authority to amend the NOPV to seek a penalty of up to \$77,114 for each violation, and up to \$179,933 for any violation resulting in death, serious illness or severe injury to any person, or substantial destruction of property, at any time prior to issuance of an order. \* \* \*

## CIVIL PENALTY ASSESSMENT GUIDELINES

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## PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGES

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49 CFR Section	Description	Guideline amount <sup>2</sup>
* * * * *		
173.24(b)(1) and 173.24(b)(2) and 173.24(f)(1) and 173.24(f)(1)(ii)	<b>Securing closures:</b> These subsections are the general "no leak" standard for all packagings. Sec. 173.24(b) deals primarily with <u>packaging</u> as a whole, while § 173.24(f) focuses on <u>closures</u> . Use §173.31(d) for tank cars, when possible. Cite the sections accordingly, using both the leak/non-leak criteria and the package size considerations to reach the appropriate penalty. <i>Any actual leak will aggravate the guideline by, typically, 50%; a leak with contact with a human being will aggravate by at least 100%, up to the maximum of \$77,114, and up to \$179,933 if the violation results in death, serious illness or injury or substantial destruction of property. For intermodal (IM) portable tanks and other tanks of that size range, use the tank car penalty amounts, as stated in § 173.31.</i>	
	- Small bottle or box.	1,000
	- 55-gallon drum.	2,500
	- Larger container, e.g., IBC; <i>not</i> portable tank or tank car.	5,000
	- IM portable tank, cite § 173.24(f) and use the penalty amounts for tank cars: Residue, generally, § 173.29(a) and, loaded, § 173.31(d).	
	- Residue adhering to outside of package (i.e., portable tanks, tank cars, etc.).	5,000

173.24(c)	Use of package not meeting specifications, including required stencils and markings. The most specific section for the package involved should be cited (see below). The penalty guideline should be adjusted for the size of the container. <i>Any actual leak will aggravate the guideline by, typically, 50%; a leak with contact with a human being will aggravate by at least 100%, up to the maximum of \$77,114, and up to \$179,933 if the violation results in death, serious illness or injury or substantial destruction of property.</i>	
	- Small bottle or box.	1,000
	- 55-gallon drum.	2,500
	- Larger container, e.g., IBC; <i>not</i> portable tank or tank car, <i>but</i> this section is applicable to a hopper car.	5,000
	<i>For more specific sections: Tank cars—§ 173.31(a), portable tanks—§ 173.32, and IM portable tanks—§§ 173.32a, 173.32b, and 173.32c.</i>	

\* \* \* \* \*

<sup>2</sup> A person who knowingly violates the hazardous material transportation law or a regulation, order, special permit, or approval issued thereunder, is subject to a civil penalty of up to \$77,114 for each violation, except that the maximum civil penalty for a violation is \$179,933 if the violation results in death, serious illness, or severe injury to any person or substantial destruction of property; and a minimum \$463 civil penalty applies to a violation related to training. Each day that the violation continues is a separate offense. 49 U.S.C. 5123; 28 U.S.C. 2461, note.

Corey Hill,  
Executive Director.

[FR Doc. 2016-15642 Filed: 6/30/2016 8:45 am; Publication Date: 7/1/2016]